Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278

REQUEST FOR CLARIFICATION

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SUMMARY

This is an informal request for Commission action pursuant to 47 CFR § 1.41.

Patrick Maupin ("Requester") requests the Commission to issue a clarification of the scope of the exemption provided by the Established Business Relationship (EBR) rule, 47 CFR § 64.1200(f)(5), as described in Section IV, paragraphs 115-124 of FCC 03-153, the Commission's 2003 Report and Order ("the Order").

The clarification sought relates to Footnote 382 ("the footnote"), which states "See Nextel Reply Comments at 15-17. However, if a consumer purchases a seller's products at a retail store or from an independent dealer, such purchase would establish a business relationship with the seller, entitling the seller to call that consumer under the EBR exemption."

This footnote, while perhaps directed to Nextel and other cellphone providers in an age where locked cellphones were the norm, is unfortunately referenced from paragraph 118, immediately *before* the discussion of Telecommunications Common Carriers, apparently rendering it generally applicable.

In 2003, the provider of a locked cellphone might be expected, after providing the sim card and provisioning service, to automatically have the consumer's telephone number and a contract to keep provisioning it, thus creating an actual EBR, while providers of other types of products would not typically have had access to the consumer's telephone number, so this footnote might have been generally sensible back then.

However, in today's climate, with the proliferation of ubiquitous data collection and consumer tracking, a consumer's single shopping trip to a single store could conceivably yield dozens of unsolicited calls from suppliers of groceries and household goods, based on credit card or store loyalty card data about the consumer. The footnote, liberally interpreted, could render the National DNC Registry powerless to stop such calls, and Requester would like the Commission to clarify that this is not the appropriate interpretation.

INTEREST OF REQUESTER

Pursuant to 47 CFR § 1.4, Requester submits the details of the circumstance that cause him to have an interest in this clarification.

Requester purchased a new car in January of this year, and, although his number has been on the National DNC Registry since 2016, subsequently received two unsolicited telephone calls from Sirius XM Radio Inc. ("Sirius").

Requester has been negotiating with Sirius, and during the process of those negotiations learned that Requester is an absent member of a class that has been provisionally certified for settlement. Over 14 million people on the National DNC Registry who were similarly called by Sirius are apparently in the class in *Buchanan v. Sirius XM*.

See, e.g. https://siriusxmdnctcpasettlement.com/faq.html

Sirius claims they have an EBR with Requester. In response to Requester's query to Sirius about their theories regarding that, their attorney Tyler Theis responded:

> Dear Mr. Maupin,
>
> Your purchase of your vehicle included a purchase of a 3-month subscription to Sirius XM Services. This would have been noted on the Monroney label (i.e., window sticker) of your vehicle upon purchase. In addition, your glovebox also would have included details relating to the Sirius XM subscription. An EBR does not require a direct transaction or inquiry between a customer and a company, it can also arise out of a customer's purchase of goods that include other products/services. For example, the FTC provides the following example:
>
> If a consumer buys a computer with peripherals — printer, keyboard, speakers — from a local retail store, the consumer will have an established business relationship with that store for 18 months from the date of purchase. In addition, the consumer may have an established business relationship with the computer manufacturer and possibly the manufacturer of the peripherals, as well as the operating system manufacturer, as long as the customer has a contractual relationship with any of these entities. If the printer comes with a manufacturer's written warranty, the manufacturer of the printer has an established business relationship with the customer. If the operating system comes with a manufacturer's written warranty, the manufacturer of the system has an established business relationship with the customer, too.
> * Source: Complying with the Telemarketing Sales Rule, published June 2016, last edited March 2019.
>
> SXM has worked hard over the years with automakers to ensure that customers

> are aware that their purchases include a SXM subscription, and to include in-vehicle materials informing customers that they may be contacted by SXM.
>
> I hope this helps answer your question and we can move forward.
>
> Best Regards,
> Tyler

Sirius's quote of the FTC's webpage is accurate, and some of the text on that webpage is a logical consequence of the Commission's footnote, although the printer warranty is a stretch. Could a written warranty on the side of a free razor attached to a tube of toothpaste purchased at retail create an EBR? It's an interesting theory that the shave-of-the-month club might find useful, but unfortunately it's one with overwhelmingly negative real-world consequences for consumers. A call from the shave-of-the-month club would be an unexpected intrusion for many who have signed up for the National DNC registry, and would likely not be expected given the tenuous relationship of the consumer with the toothpaste manufacturer, never mind the maker of the attached free razor.

Likewise, the calls from Sirius to Requester were an intrusive annoyance. Sirius seems to treat the car as a radio that happens to have transportation capabilities. But Requester did not buy the car for the radio, does not want the service, does not do business with Sirius, did not ask about the radio or service, and generally just wants to be left alone.

RELIEF SOUGHT

Although there are wider questions about the applicability of the footnote that the Commission, on reflection, may need to address in a formal Order, Requester's immediate concerns are narrow, and only relate to the dispute between him (and 14 million of his fellow DNC compatriots) and Sirius. The Commission's response to this request will inform Requester's actions, and, if provided in a timely fashion, may alter the course of the *Buchanan v Sirius* class action.

Therefore, the Commission is requested to, at its earliest convenience:

1) Clarify that the purchase of an automobile at retail from a car dealer does not automatically create an EBR between the automobile purchaser and the third party provider of a radio subscription service, no matter how much the third party incentivizes either the car manufacturer or the dealer.

2) Clarify that as a sophisticated telemarketer – extremely knowledgeable about both the TCPA and the Commission's rules and procedures, having both submitted comments and appeared at ex parte hearings – Sirius would have known how to request clarification on this issue, and is not entitled to any safe harbor based on possible confusion about its responsibilities.

3) Clarify that the Commission's regulations and interpretive discussions that put the burden of proof regarding the EBR on the telemarketer and that require telemarketers to be able to show clear and convincing evidence of the EBR mean that any telemarketer should easily be able to provide such call data to prove its case in discovery, and that any contentions made by a telemarketer that it would be too costly to provide affirmative per-consumer EBR proof because of the millions of calls made by it or on its behalf is a problem of the telemarketer's own making that should not shield it from liability or responsibility for its actions.

CONCLUSION

Sirius has, for years, been bothering millions of consumers who have signed up for the National DNC with unwanted calls, based on a bogus interpretation of the EBR. (They have also had to settle multiple class actions regarding robocalls, and have had to settle with various state attorney generals regarding both DNC violations and general bad business practices.)

As the Commission knows, Sirius is not really interested in leaving consumers alone; its filings and ex parte meetings clearly indicate, for example, that it feels threatened by voluntary agreements between consumers and call-blocking solution providers, and thinks those agreements should be made illegal, insofar as they block calls from Sirius.

Requester commends the Commission for ignoring Sirius's entreaties about the ills of call-blocking technology, and asks the commission to help insure that Sirius's overbroad interpretation of the EBR is not allowed to provide a legal precedent that would allow any company to easily manufacture specious EBRs.

Respectfully submitted,

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